

The claimant requested review and raises the following issues: (1) whether the claimant met with personal injury by accident arising out of and in the course of employment; (2) nature and extent of disability, if any; and, (3) whether the claimant is entitled to unauthorized and future medical.

Respondent argues the facts support the ALJ's determination the claimant did not meet his burden of proof to establish he was injured on September 1, 2000, at work for respondent. Consequently, respondent requests the Board to affirm the ALJ's Award.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant had worked as an installer and delivery driver for respondent for about 10 years. His job duties included delivering and installing office furniture, as well as cubicle work stations. Claimant alleged he was injured on September 1, 2000, while attempting to slide a work cubicle over a few inches.

Claimant testified that as he was attempting to push the cubicle he twisted and fell injuring his back. Claimant testified that a co-worker was helping him move the cubicle and it was either Joe or Mickey. Claimant further testified that he told his co-worker that he had hurt his back.

Claimant noted that his accident had dented one of the panels on the cubicle and he had to remove that panel and step on it in order to remove the dent. Claimant testified that when he returned to respondent's office he notified his supervisor, Tim Madl, that he had hurt his back pushing a cubicle.

Claimant initially testified that the day after the accident his back was hurting and he never left the house. Claimant testified:

Q. (By Ms. Burkhead) Do you recall whether or not on September 2nd, 2000, which would be the day following your injury, whether or not you were in pain or whether or not you were walking in an abnormal way?

A. I was in pain. I was sort of walking with a straight back. I really didn't leave the house.¹

¹ R.H. Trans. Cont'd. at 21.

Claimant's version of the events on September 1, 2000, are disputed by his co-workers as well as his supervisor. Respondent identified its only employees by the name of Mickey and Joe. Mickey Connor testified that he worked side by side with claimant on September 1, 2000, at the VFW work site and that he did not believe Joe Gaddis worked at the VFW on that date. Mr. Connor noted that he did not believe claimant attempted to slide a cubicle over on that date and was not told by the claimant that he had been hurt. Mr. Connor further noted claimant did not appear to be injured. Mr. Connor concluded claimant was not telling the truth because as they performed their work that day the claimant was not around the panels.

Joe Gaddis testified that on September 1, 2000, he had just recently started working for respondent and was not sent out on many jobs and consequently, he did not believe that he was at the VFW work site on September 1, 2000. Mr. Gaddis was positive that claimant never told him he had been injured on that date.

Timothy E. Madl testified that he was claimant's supervisor and denied that claimant told him on September 1, 2000, that he had injured his back at work. Mr. Madl testified that on September 5, 2000, when claimant did tell Mr. Madl that he had been injured, claimant was immediately sent to the doctor. Mr. Madl further noted that based upon work schedules Joe Gaddis was not on the job with claimant on September 1, 2000, and that Mickey Conner was on the job.

The alleged injury occurred on Friday, September 1, 2000. Because of the Labor Day holiday the claimant did not return to work until Tuesday, September 5, 2000. A co-worker, James Williams, testified that he was with the claimant in the evening on September 1, 2000, and claimant neither mentioned he had been injured at work that day nor complained of pain. Mr. Williams further testified claimant did not appear to be in pain and was going out to a party that night.

Scott Williams, a co-worker, who also lived with claimant's mother, testified that over the Labor Day holiday the claimant came to visit and while there told Mr. Williams that he had been helping a friend put trusses on a roof. Mr. Williams further testified that claimant never mentioned that he had been injured at work nor did he appear to be in pain. But Mr. Williams observed claimant appeared to be walking normally although a little stiff but was more so on the following day at work.

Claimant later admitted he helped a friend who was building a house and that on September 2, 2000, he was there for a couple of hours but the most he did was hold a rope and maybe hammer a few nails. Claimant specifically denied he injured his back over the Labor Day holiday.

When claimant saw Dr. Mary E. Brothers, he gave a history of injury that while helping move a large modular work unit his right foot slipped and he twisted injuring his back. Dr. Brothers specifically asked whether claimant had fallen and he denied it. Dr.

Brothers noted that the history claimant gave the physical therapist before his functional capacity evaluation was inconsistent because he told the therapist that he fell to his knees. When claimant saw Dr. Truett L. Swaim, he gave a history of pushing on a work station and as the lower section gave way he fell onto his right side and twisted his back. The claimant gave Dr. Vito J. Carabetta a similar description of his accident.

The Workers Compensation Act places the burden of proof on injured workers to establish their right to compensation.² And that burden is to persuade the trier of facts by a preponderance of the credible evidence that their position on an issue is more probably true than not when considering the whole record.³

There were several inconsistencies in claimant's version of events. He gave the medical providers different versions regarding how the alleged accident occurred. Dr. Brothers testified that claimant was specifically asked if he fell and he indicated that he did not. Other providers were given a history of a fall to his knees or a fall onto his back. Perhaps the most damaging inconsistency was the testimony of his co-worker, Mr. Connors, who indicated that claimant was not working near the cubicles and that he worked side-by-side with claimant on the day of the alleged injury and claimant simply did not attempt to move a cubicle that day.

Claimant's testimony that he reported the alleged injury the day it happened was denied by his supervisor. The supervisor's version is corroborated by the fact that when he was advised of the alleged injury on the first work day after the Labor Day weekend, he immediately referred claimant to a physician. The evening of the alleged accident another co-worker was with claimant and noted claimant did not mention a work-related accident, did not appear in pain and was going to a party. Although claimant initially indicated that he was in pain and stayed home the day after the alleged injury, he later agreed that he had stopped by a friend's house for a few hours and might have helped hold some ropes while roof trusses were being installed on the house.

The preponderance of the credible evidence supports the ALJ's determination that claimant failed to meet his burden of proof to establish he suffered accidental injury arising out of and in the course of his employment with respondent. The Board affirms.

AWARD

WHEREFORE, it is the finding of the Board that the Award of Administrative Law Judge Steven J. Howard dated March 11, 2003, is affirmed.

² K.S.A. 44-501(a); *see also Chandler v. Central Oil Corp.*, 253 Kan. 50, 853 P. 2d 649 (1993) and *Box v. Cessna Aircraft Co.*, 236 Kan. 237, 689 P.2d 871 (1984).

³ K.S.A. 44-508(g); *see also In Re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

IT IS SO ORDERED.

Dated this _____ day of September 2003.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Leah Brown Burkhead, Attorney for Claimant
Thomas R. Hill, Attorney for Respondent and its Insurance Carrier
Steven J. Howard, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director